

**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT JACKSON**

DONALD BUCKINGHAM and wife,)
CATHERINE BUCKINGHAM,) Decatur County Chancery Court
) No. 2371
)
Plaintiffs/Appellees.)
)
VS.) C. A. No. 02A01-9412-CH-00278
)
MARTHA THOMAS, et al)
)
Defendants/Appellants.)

<p>FILED</p> <p>January 16, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

From the Chancery Court of Decatur County at Decaturville.
Honorable Walton West, Chancellor

Ricky L. Wood, Parsons, Tennessee
Attorney for Defendants/Appellants.

Paul Kevin Carter,
MILAM AND CARTER, Lexington, Tennessee
Attorney for Plaintiffs/Appellees.

OPINION FILED:

AFFIRMED IN PART AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S.: (Concurs)

TOMLIN, Sp. J. : (Concurs)

This case arises out of a complaint filed in the Chancery Court of Decatur County by Appellees, Donald and Catherine Buckingham (Buckinghams), against Appellants, Martha Thomas, Ricky Thomas, Sheila Thomas, Bobby D. Thomas and Jamie Page (Thomases). In their complaint, the Buckinghams alleged that they were entitled to access their property by means of an old road, which traverses the Thomases' property. The trial court ruled that the Buckinghams, as abutting landowners of a once public road, had the right to access over the road. The Thomases have appealed this judgment.

The pertinent facts are as follows: The Thomases and the Buckinghams own tracts of land in close proximity to each other. The tracts do not touch, but are instead separated by a tract of land owned by Champion International Paper Company, Inc. (the Champion property). An old dirt road commonly referred to as "Swallow Bluff Road" begins at Highway 114 in Decatur County and runs in a westerly direction across the Thomases' property to the neighboring property of Bryan and Tim Keeton (the Keeton property). Swallow Bluff Road then runs southeast across the Keeton property until it again meets the Thomases' property. After crossing the southwest corner of the Thomases' property, Swallow Bluff Road runs onto the Champion property and ends near the Tennessee River.

Another old dirt road commonly referred to as "Jim Buggs Road," runs north and south along the eastern border of the Buckinghams' property. At the northern boundary of the Buckinghams' property, the Jim Buggs Road veers northwest and crosses a portion of the Champion property before it meets the Swallow Bluff Road. There is a dispute between the two parties as to whether the Jim Buggs Road terminates when it joins the Swallow Bluff Road or whether it joins with the Swallow Bluff Road at that point and follows the path of the Swallow Bluff Road to Highway 114.¹

¹It appears from its order that the trial court found that the Jim Buggs Road travels along the same path as the Swallow Bluff Road across the Thomases' property until it ends at Highway 114. There was sufficient evidence presented at trial to support this finding. Eulis Montgomery testified that he had always heard the entire road called the "Bugg Road," while others had referred to it as the Swallow Bluff Road. Ross Wyatt testified that he thought the road abutting the Buckinghams' property was the Swallow Bluff Road. Consequently, we will refer to the roadway running northeast from the Buckinghams' land to Highway 114 as the Swallow Bluff-Jim Buggs Road.

Sometime around 1986 or 1987, the Thomases began having problems with trespassers who would go down the road to make campfires and drink alcohol. Consequently, Ricky Thomas constructed a cable across the road and placed a lock on the cable. The Thomases gave a key to all adjoining landowners. In the Spring of 1992, Southern Timber Mart of Tennessee, Inc., the predecessors in title to the Buckinghamhs, sought to use the Swallow Bluff-Jim Buggs Road to remove timber cut on their property. The Thomases initially gave a key to Southern Timber Mart, but a disagreement later arose between Southern Timber Mart and the Thomases as to the maintenance of the road. Consequently, the Thomases put another lock on the cable, and refused to allow Southern Timber Mart to have access to the road.

Southern Timber Mart brought suit against the Thomases, asserting the right to use the road. The lawsuit was dismissed by consent of the parties. In November of 1993, the Buckinghamhs purchased the property from Southern Timber Mart. When the Buckinghamhs sought to use the road, the Thomases denied their request. This lawsuit followed.

The Buckinghamhs brought suit, asking that the Thomases be enjoined from interfering with their use of the road. The Buckinghamhs based their right to access of the road on two alternate theories: The road was a public road and they, as members of the general public, were entitled to use the road, or in the alternative, they, as abutting landowners, have acquired a private easement to use this road over the Thomases' property. Additionally, the Buckinghamhs prayed for damages incurred as a result of the delay of their timber sales due to the Thomases' unlawful interference with the road.

In their answer, the Thomases denied that the road crossing their property was ever a public road, and they further asserted that the Buckinghamhs did not have an easement over their property. The Thomases plead, as an affirmative defense, that they had acquired ownership of the roadway by adverse possession and that the Buckinghamhs were barred from bringing their claim under T.C.A. § 28-2-102. The Thomases also raised an issue of equitable estoppel.

After a bench trial, the chancellor found that the Swallow Bluff Road and the Jim Buggs Road were public roads at one time. He held that the Buckinghamhs, as abutting owners of a once public road, had the right to access over the road even though the road had been abandoned.

However, the trial court did not address the Thomases' claim of adverse possession and their assertion that the Buckinghamhs were barred from bringing their claim under the statute of limitations under T.C.A. § 28-2-102. Instead, the Thomases were ordered to provide the Buckinghamhs with a key to the locked cable. Additionally, the trial court did not address the Buckinghamhs' request for damages that resulted from the delay in harvesting their timber.

The Thomases have appealed the lower court's ruling, presenting the following issues for our review:

1. Whether the Chancellor erred in finding that the [Buckinghamhs] had the right to use the roadway across the [Thomases'] property as an abutting landowner to an abandoned public road.

2. Whether the [Thomases] established ownership of Swallow Bluff Road by adverse possession and/or, whether the [Buckinghamhs'] action is barred by the statute of limitations, pursuant to T.C.A. § 28-2-102.

3. Whether the Chancellor erred in failing to apply the doctrine of equitable estoppel.

The Buckinghamhs present the following issue for review:

Whether the Chancellor erred in not awarding damages to the [Buckinghamhs] for the delays in harvesting their timber caused by the [Thomases].

Our review of this matter is *de novo*, however, the record developed below comes to us accompanied by a presumption of correctness which we must honor unless we find that the evidence preponderates against the trial court's findings of fact. T.R.A.P. 13(d). Furthermore, where issues in a case turn upon the truthfulness of witnesses, the trial judge, as the trier of fact in a non jury case, has the opportunity to observe the witnesses and their manner and demeanor while testifying and is in a far better position than this Court to decide those issues. *State ex rel. Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968); *Town of Alamo v. Forcum-James Co.*, 205 Tenn. 478, 327 S.W.2d 47 (1959); *Leek v. Powell*, 884 S.W.2d 118 (Tenn. App. 1994). The weight, faith and credit to be given to any witness' testimony lies in the first

instance with the trier of fact and the credibility accorded will be given great weight by the appellate court. *Id.*

It is clear under the law of this state that abutting landowners, along a once public road, have a private easement of access over the road to their premises, even after the road is abandoned. *Knierim v. Leatherwood*, 542 S.W.2d 806, 810 (Tenn. 1976). However, for this law to apply, there must necessarily be a threshold determination that a road was once public. While no evidence was presented at trial that would show that the Swallow Bluff-Jim Buggs Road had been dedicated as a public road, it is evident from the testimony of several witnesses that the entire road was for many years open to public travel and acquiesced in for use as a public road. Consequently, we are of the opinion that the chancellor did not err in finding that the road in question was at one time a public road.

Lester Brasher, testified that the Swallow Bluff Road was an open road in the 1920s and 1930s and several people had lived on the road. He testified that he had hauled logs over the road in his younger days and had never been required to seek permission to use the road. Leonard Magers testified that he too had hauled cross ties down the Swallow Bluff Road, and that he had never been required to ask permission to use the road. Tommy Newman testified that there were several houses on the Swallow Bluff-Jim Buggs Road forty to fifty years ago. He testified that he had never asked permission to use the road prior to the placing of the cable across the road. Donald Buckingham testified that there were old home places on his property near a portion of the road. Paul Montgomery, who owned the tract of land east of the Buckingham's property, testified that he had always used the Swallow Bluff-Jim Buggs Road to access his property.

Dedication of a highway or a roadway may be shown by conduct of the owner and it is not necessary to prove formal overt acts. *Nashville Trust Co. v. Evans*, 206 S.W.2d 911, 914 (Tenn. App. 1947). In our opinion, the evidence does not preponderate against the finding of the chancellor that the road was at one time a public road.

In their answer, the Thomases asserted an alternate defense, claiming that if the road was found to have been a public road, they had adversely possessed the portion of the road crossing

their property and/or the Buckingham's suit was barred by T.C.A. § 28-2-102 for failure to bring a claim to abate adverse use of property within seven years. However, the trial court did not address the Thomases' defenses.

Under T.C.A. § 28-2-102, a suit to abate adverse use of property by another under color of title must be brought within seven years from the time the cause of action arises, or the right of action is forever barred.² T.C.A. § 28-2-102 protects persons, who are holding adversely under a color of title, from suits to oust them from the entire boundary of lands on which they are adversely holding a portion. *Shearer v. Vandergriff*, 661 S.W.2d 680 (Tenn. 1983).

We note that under the holding in *Boyd v. Hunt*, 102 Tenn. 495, 52 S.W. 131 (1899), a right-of-way may be extinguished by twenty (20) years adverse use. Under T.C.A. § 28-2-102, a suit to abate this adverse use must be brought within seven (7) years from the time the cause of action arose or the right of action is barred. *See Shearer*, 661 S.W.2d at 682. In the interim period of time between the seven (7) years and twenty (20) years, if the adverse holding ceases, the person who has the right-of-way may resume his use, as the right-of-way still exists. *Id.* On the other hand he may not bring an action to abate the adverse use during that period and if the adverse use continues for twenty (20) years, the right-of-way is extinguished. *Id.*

The Buckingham's filed their complaint on December 6, 1993. The Thomases argue that they have adversely possessed the road for over fifty years. However, there is conflicting testimony in the record as to whether the road could be used without permission prior to the installation of the cable across the road. Additionally, there is a discrepancy as to when the cable itself was installed. Nancy Thomas testified that the cable was erected in 1987. Ricky Thomas testified that he had placed the cable on the road around 1986 or 1987. Arthur Ray Montgomery,

²T.C.A. § 28-2-102 provides:

On the other hand, any person, and those claiming under him neglecting for the said term of seven (7) years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in § 28-2-101, are forever barred.

on the other hand, testified that the cable had been in place for four or five years at the most. In his deposition taken on March 31, 1993, William Hopper testified that the cable had been across the property for only three to four years. Accordingly there are disputed facts in the record as to (1) whether the Thomases have adversely possessed the road; and (2) whether they have adversely possessed the road long enough to extinguish the Buckingham's easement or at least to bar them from bringing a cause of action to abate the Thomases' adverse possession.

These factual issues should properly have been resolved by the trial court. Consequently, we remand these for the trial court's determination of the issues of adverse possession and the statute of limitations.

Finally, the Thomases argue that the Buckingham's should be equitably estopped from bringing this action. The Thomases appear to base this argument on their assertion that they consented to a voluntary dismissal of the prior lawsuit brought by Southern Timber Mart solely because they believed that the dismissal would resolve all issues concerning the use of the roadway. However, after the prior lawsuit was dismissed, Southern Timber Mart conveyed its property to the Buckingham's, and the Buckingham's filed their suit against the Thomases. The Thomases allege that the Buckingham's knew of the supposed resolution of the roadway issue when they bought the land. They further allege that they have suffered additional expenses due to the Buckingham's refiling of virtually the same lawsuit. Consequently, they argue that the Buckingham's should be equitably estopped from bringing this lawsuit and that they should instead be bound by Southern Timber Mart's dismissal of the prior lawsuit.

The elements of equitable estoppel were set forth by this Court in *Consumer Credit Union v. Hite*, 801 S.W.2d 822 (Tenn. App. 1990):

The essential elements of an equitable estoppel as related to the party estopped are said to be (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts. As related to the party claiming the estoppel they are (1) Lack of knowledge and of the means of knowledge of the truth as

to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially. (Citations omitted.)

Hite, 801 S.W.2d 822 at 825 (citing *Callahan v. Town of Middleton*, 292 S.W.2d 501 (Tenn. App. 1954)).

Under Tennessee law, estoppel is not favored and it is the burden of the party seeking to invoke the doctrine to prove each and every element. *Robinson v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d 559, 563 (Tenn. App. 1993); *Bokor v. Holder*, 722 S.W.2d 676, 680 (Tenn. App. 1986). The doctrine is ordinarily applicable only to false misrepresentations as to facts, either past or present. *Hite*, 801 S.W.2d at 825 (Tenn. App. 1990). In the case at bar, there is neither an allegation nor proof by the Thomases that the Buckinghamhs made a false representation as to a past or present fact or concealed material facts from the Thomases. The trial court found that the Thomases' equitable estoppel argument was without merit. We agree.

We believe that our ruling renders the consideration of any other issues moot.

The judgment of the trial court is affirmed in part and this cause is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to one-half to Appellants and one-half to Appellees, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S. (Concurs)

TOMLIN, Sp. J. (Concurs)